In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 309

JOSEPH L. TRAVERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

An indictment in the United States District Court for the District of Massachusetts charged that petitioner, officer of a Massachusetts corporation, paid co-defendant Pomfret, officer of a prime contractor holding negotiated contracts with various federal agencies, the sum of $3,000 as an inducement for the award of subcontracts and as acknowledgement of subcontracts previously awarded to petitioner's company, in vio-

lation of 41 U.S.C. 51-54.* A second count charged that co-defendant Pomfret received the foregoing payments (R. 4-6). Pomfret pleaded guilty before trial (R. 2). Petitioner was found guilty after a

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* 41 U.S.C. 51 provides, in pertinent part:

> The payment of any fee, commission, or compensation of any kind or the granting of any gift or gratuity of any kind, either directly or indirectly, by or on behalf of a subcontractor, as defined in section 52 of this title, (1) to any officer, partner, employee, or agent of a prime contractor holding a negotiated contract entered into by any department, agency, or establishment of the United States for the furnishing of supplies, materials, equipment or services of any kind whatsoever; or to any such prime contractor or (2) to any officer, partner, employee, or agent of a higher tier subcontractor holding a subcontract under the prime contract, or to any such subcontractor either as an inducement for the award of a subcontract or order from the prime contractor or any subcontractor, or as an acknowledgment of a subcontract or order previously awarded, is prohibited. * * * The amount of any such fee, cost, or expense shall be recoverable on behalf of the United States from the subcontractor or the recipient thereof by setoff of moneys otherwise going to the subcontractor either directly by the United States, or by a prime contractor under any contract or by an action in an appropriate court of the United States. Upon a showing that a subcontractor paid fees, commissions, or compensation or granted gifts or gratuities to an officer, partner, employee, or agent of a prime contractor or of another higher tier subcontractor, in connection with the award of a subcontract or order thereunder, it shall be conclusively presumed that the cost of such expense was included in the price of the subcontract or order and ultimately borne by the United States. * * *

41 U.S.C. 54 provides:

> Any person who shall knowingly, directly or indirectly, make or receive any such prohibited payment shall be fined not more than $10,000 or be imprisoned for not more than two years, or both.

trial by jury and sentenced to imprisonment for four months and to pay a fine of $2,500 (R. 4, 17). The court of appeals affirmed (Pet. App. 6-9).

Petitioner contends that the opinion of the court below sustains a conviction under an indictment expressly based upon 41 U.S.C. 51, which contains a conclusive presumption applicable only to civil cases. In fact, however, the court of appeals noted that the criminal penalty is prescribed by 41 U.S.C. 54, and it held that Section 51 is relevant only to the extent that it defines "prohibited payment" as used in Section 54. The presumption that a proscribed payment was included in the price of the subcontract and ultimately borne by the United States relates solely to the right of the United States to recover that amount in a civil suit; it does not bear upon criminal liability. Criminal liability attaches once a prohibited payment is made by a subcontractor regardless of whether official action is thereby affected, or whether the United States suffers any loss. *Howard* v. *United States*, 345 F. 2d 126 (C.A. 1). As the court of appeals observed, the charge, which petitioner's counsel commended as "excellent," made no reference to the presumption (R. 6-16). *Tot* v. *United States*, 319 U.S. 463, and *United States* v. *Romano*, 382 U.S. 136, which dealt with the constitutionality of presumptions, are inapposite since this conviction did not rest on any presumption at all.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

AUGUST 1966.

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